FOR ARGUMENT

SUPREME COURT, U.S.
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No. 87-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its opening brief, Petitioner, Harbison-Walker Refractories ("Harbison-Walker" or the "Company") demonstrated that the decision below erroneously permits an age discrimination plaintiff to present his case to a jury, even though he has offered no direct or indirect evidence that the challenged employment decision was motivated by his age. Though Respondent and its amici urge this Court to sanction that error—and thus, in effect, to emasculate the role of summary judgment in age discrimination cases—they provide no convincing reasons for this Court to do so.

I.

Respondent and its amici cannot, and do not (R. Br. 78, U.S. Br. 9-10, PELA Br. 17), dispute that "[t]he ultimate burden of persuading the trier or fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Watson v. Fort Worth Bank & Trust*, —— U.S. ——, 56 U.S.L.W. 4922, 4924 (June 29, 1988). Nor can they dispute (U.S. Br. 17-18) that summary judgment must be entered against a plaintiff who, faced with an employer's properly-supported motion, "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). But they assiduously avoid the result that these principles compel: that an age discrimination plaintiff cannot survive summary judgment unless a fair-minded jury could conclude, from the record as a whole, that the plaintiff was the victim of intentional discrimination "because of [his] age" (Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1) (1982); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)), and that a fair-minded jury could not have so concluded here.

The evidence in this age discrimination case "is so one-sided that [Petitioner] must prevail as a matter of law." *Anderson*, 477 U.S. at 252. As explained in its opening brief (P. Br. 6, 16-18), Harbison-Walker supported its summary judgment motion with admissible evidence that it based its decision to lay off Respondent earlier than 39-year-old Hugh Faust, and later to recall Faust rather than Respondent, on entirely legitimate and age-neutral reasons. It demonstrated that the economic downturn in its business prompted Respondent's layoff (J.A. 12-15); that the Company had, and followed, an informal layoff policy which required consideration of both "[l]ength of company service *and* skill requirements necessary to carry out the reduced business activities . . ." (J.A. 47; emphasis added); that the Company had, and followed, a policy which required special corporate review of any layoff affecting an employee with more than 15 years of service (J.A. 128-32); that, in addition to installation experience, Faust had skills in marketing and administrative matters—functions that Respondent had neither the experience nor the training to perform—which the Company could draw upon in the reduced work environment (J.A. 14-15, 105); that the Company in fact used Faust's more diverse skills after Respondent's layoff in July 1982, both before Faust's November 1982 furlough (J.A. 156) and after his August 1983 recall (J.A. 160); and that, while both Faust and Respondent had substantial company service, Faust generally had higher performance ratings than Respondent (J.A. 15, 31). Harbison-Walker, moreover, presented substantial indirect, objective evidence—e.g., the Company initially retained and recalled an *older* installation specialist, 59-year-old Al Malarich, instead of Respondent (J.A. 33, 123-25); only three of the twelve employees laid off from the Company's Iron and Steel Marketing Support Group ("Steel Group") in 1982 were over age 40 (J.A. 33); after the layoffs, over half of the employees remaining in the Steel Group were over age 40 (J.A. 32); and the average age of the Steel Group's employees actually increased as a result of the layoffs (J.A. 31-32)—which amply demonstrate that its decision was not motivated by Respondent's age.

Respondent nonetheless characterizes this case as a "classic case of . . . sharply conflicting evidence" in which "[g]enuine disputes about material facts . . . abound" (R. Br. 9, 54). This case presents nothing of the sort. Respondent has conceded the underlying material facts—to wit, that the economic downturn in Harbison-Walker's business prompted his layoff (J.A. 94, R. Br. 2-3); that

the Company's layoff policy turned, in part, on its assessment of skill requirements needed in the reduced business setting (J.A. 96, R. Br. 19); that Faust had more diverse experience than Respondent (J.A. 52-53, R. Br. 42); and that the Company occasionally drew upon Faust's more diverse skills in the reduced work environment (J.A. 44, R. Br. 49-52). Respondent's persistent quibbling about immaterial facts (R. Br. 18-43) (e.g., his subjective evaluation of his and Faust's respective qualifications as pure installation specialists) only underscores the absence of either direct or indirect evidence from which a reasonable jury could have inferred that the Company's business judgment was motivated by age.

To be sure, intentional discrimination often presents an "elusive factual question." *Burdine*, 450 U.S. at 255 n.8. But the general elusiveness of the inquiry does not mean, as Respondent and its amici insist (R. Br. 61-72, AARP Br. 7-8, PELA Br. 23-27), that cases which turn on motive are uniformly inappropriate for summary judgment. This Court rejected that argument in *Anderson* (477 U.S. at 256):

> Respondents argue . . . [that] the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. . . . We do not understand *Poller* [*v. Columbia Broadcasting System*, 368 U.S. 464 (1962)], however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial. . . .

Because Respondent failed to present any "concrete evidence" from which a reasonable jury could have inferred that Harbison-Walker discriminated against him because

of his age, the mere fact that Harbison-Walker's motive is at issue does not defeat summary judgment.[1]

II.

Diverting attention from the crucial inquiry in age discrimination cases—whether the plaintiff has produced sufficient evidence from which a reasonable fact finder could conclude that he is a victim of intentional discrimination because of his age—Respondent and its amici attribute to Petitioner arguments that are not, and have never been, its position.

A.

Petitioner has not, as the United States suggests (U.S. Br. 13), mounted "an oblique attack" on this Court's decision in *Burdine*. Petitioner has always recognized (P. Br. 14) that a plaintiff can prove employer pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973). *See also United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Harbison-Walker has merely claimed that (P. Br. 14-18), regardless of whether the plaintiff seeks to prove his case directly or indirectly, he must "prove by a preponderance of the evidence that the legitimate rea-

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[1] Respondent places great weight on *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), to support its argument that this Court has cautioned against summary judgment in motive cases (R. Br. 61-72). But the Court in *Anderson* expressly stated that *Hutchinson*'s statement that proof of malice "'does not readily lend itself to summary disposition' was simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions. . . .'" *Anderson*, 477 U.S. at 256 n.7 (quoting *Hutchinson*, 443 U.S. at 120 n.9, and *Calder v. Jones*, 465 U.S. 783, 790-91 (1984)).

sons offered by the defendant were not its true reasons, but were a pretext for discrimination" (*Burdine*, 450 U.S. at 253; *see also Watson v. Fort Worth Bank & Trust*, 56 U.S.L.W. at 4924), and that Respondent did not do so here.

The court below did not "faithfully follow[]" (U.S. Br. 10) these standards. It held that the Company's use of Faust's more diverse skills for less than 25 percent of the time after his recall cast doubt on the credibility of its explanation for Respondent's layoff, and thus "permit[ted] a reasonable inference that the . . . proffered explanation . . . is unworthy of credence" (Pet. App. 2a). But Respondent's challenge to the credibility of the Company's reason does not prove that the "proffered explanation lack[s] a factual basis" and is a pretext for discrimination. *Burdine*, 450 U.S. at 258. To the contrary, because Respondent concedes that Faust had more diverse experience than Respondent and that Harbison-Walker relied upon that experience some of the time, a jury could not reasonably infer from his challenge that the Company's stated reason was "not its *true* reason[ ]" (*id.* at 253; emphasis added), much less that it was a "cover-up" for intentional age discrimination (*McDonnell Douglas*, 411 U.S. at 805). *Burdine*'s "unworthy of credence" language cannot be fairly read to encompass an objectively truthful, but perhaps subjectively disagreeable, explanation for a business decision. *See, e.g., Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559-560 (7th Cir.), *cert. denied*, 108 S. Ct. 488 (1987); *Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 596-97 (11th Cir. 1987); *Dea v. Look*, 810 F.2d 12, 14-16 (1st Cir. 1987).

The United States misses the mark in contending that Petitioner's analysis "misstate[s] . . . the use to which th[e] evidence [of Faust's post-recall duties] was put" and that Respondent's argument is not that Harbison-Walker's decision was "unwise" (U.S. Br. 16). Respondent's arguments below (J.A. 37-45, 51-53), and his arguments here (R. Br. 32-55), reveal the true nature of his challenge: that Harbison-Walker misjudged Respondent's qualifications and its need for Faust's more diverse skills. The court below, moreover, found that a jury could find unlawful "pretext" if Faust's " 'more varied" skills were *neither employed nor required*" by Harbison-Walker. Pet. App. 5a (emphasis added). But it is undisputed that Faust's skills were "employed"; and permitting a jury to decide whether those skills were "required" simply invites subjective disagreement with Harbison-Walker's business judgment. Even the United States concedes (U.S. Br. 16), and the case law clearly holds (*see, e.g., Branson v. Price River Coal Co.*, 46 Fair Empl. Prac. Cas. (BNA) 1003, 1006-07 (10th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987)), that such subjective disagreement cannot support a finding of pretext.

This is not to say, and Petitioner has never asserted, that evidence of an employer's actions after making a challenged employment decision can "never . . . be used to establish pretext" (U.S. Br. 16). In some circumstances, such evidence might be indirectly probative of the employer's intent (*see id.* at 17). But, here, Respondent's concession that Harbison-Walker used Faust's more diverse skills some of the time renders that evidence "not significantly probative" (*Anderson*, 477 U.S. at 249-50), especially when viewed in light of the record as a whole. *See* U.S. Br. 11 ("[I]t is arguable that respondent's evidence—which did not refute the contention that petitioner used Faust's office skills at least some of the time—was not sufficiently probative to raise real doubts about petitioner's veracity"). Thus, Harbison-Walker's failure to use Faust's skills more often—though perhaps probative, in retrospect, of the accuracy of the Company's prediction of its future needs—is simply too attenuated a base for permitting a jury to find a "pretext for [age] discrimination." *Burdine*, 450 U.S. at 253.

B.

Respondent and its amici further challenge a principle that should be incontrovertible (R. Br. 75-86, U.S. Br. 14-15, AARP 11-12): that, to survive summary judgment in an age discrimination case, an ADEA plaintiff must "forge [a] link between the challenged decision and age" (P. Br. 18) with evidence that is sufficient to permit a fair-minded jury to conclude that the employer engaged in unlawful discrimination. This challenge is unfounded.

The necessary link to age discrimination is not, as Respondent's amici contend, "forged by the establishment of a prima facie case" (U.S. Br. 14; *see also* AARP Br. 11). A discrimination plaintiff's initial burden of proving a prima facie case is "not onerous" (*Burdine*, 450 U.S. at 253).[2] Of course, once established, a plaintiff's prima facie case gives rise to a "presumption that the employer unlawfully discriminated against the employee" (*id.* at 254). But it is also true that the employer's articulation of " 'some legitimate, nondiscriminatory reason for the employ[ment action]' " (*id.* at 253, quoting *McDonnell Douglas*, 411 U.S. at 802) "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Burdine*, 450 U.S. at 254-55 and n.10. Thus, although the fact finder may consider the plaintiff's initial evidence in deciding the ultimate issue of discrimination—and Petitioner has never argued, as the United States claims, that the fact finder cannot do so (*compare* U.S. Br. 15 *with* P. Br. 13-14

[2] Indeed, as Petitioner noted in its opening brief (P. Br. 13 n.6), some circuits, including the Third Circuit, have concluded that a plaintiff can establish a prima facie case merely by demonstrating that he is in the protected age group and was laid off while younger employees were retained in similar jobs for which he was qualified. *See Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Thornbrough v. Columbus & Greenville Railroad*, 760 F.2d 633, 641-45 (5th Cir. 1985).

n.7)—that evidence, once rebutted, carries no presumptive force at all and is insufficient, by itself, to withstand summary judgment. *See Burdine*, 450 U.S. at 254-55 and n.10; *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) ("[a] *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination . . .").[3]

This is not a case in which the employer articulated an objectively false reason for an employment decision.[4] To the contrary, Harbison-Walker effectively rebutted Respondent's prima facie case with a legitimate explanation for its decision to retain and recall a younger employee; and Respondent has not disputed the material facts underlying that decision. To survive summary judgment in this case, therefore, Respondent could not "merely rest on the laurels of [his] prima facie case. . . ." *Grigsby v. Reynolds Metal Co.*, 821 F.2d at 596. He had to come forward with something more probative than his subjective disagreement with the wisdom of his employer's decision to "forge the critical link" (Pet. App. 23a) between that decision and his age.

[3] *See generally* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 Stan. L. Rev. 1129, 1145-47 (1980). The insistence of Respondent and its amicus that this Court has rejected Professor Thayer's "bursting bubble" theory of presumptions—and their effort to treat the plaintiff's prima facie evidence as carrying, in effect, a mandatory inference of discrimination (R. Br. 81-84, PELA Br. 11-16)—are flatly contrary to this Court's decision in *Burdine*. *Burdine* makes abundantly clear that Professor Thayer's theory is precisely the theory that governs presumptions in employment discrimination cases. *See* 450 U.S. at 255 n.10 (citing J. Thayer, *Preliminary Treatise on Evidence* 346 (1898); *id.* at 254 n.7 (in employment discrimination cases, a prima facie case "denote[s] the establishment of a legally mandatory, rebuttable presumption," rather than "the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue").

[4] As Petitioner suggested in its opening brief (P. Br. 15 n.8), had Respondent done so, summary judgment might well have been inappropriate.

Nothing in Petitioner's Brief suggests, as Respondent's amici seemingly believe (U.S. Br. 14), that Respondent had to forge that "link" with direct evidence of an intent to discriminate. Petitioner made clear in its opening brief that, consistent with *Burdine* and *Aikens*, indirect evidence may suffice if it is sufficiently probative of the ultimate issue of age discrimination (P. Br. 14-16). As Petitioner explained (*id.* at 15-16; citations omitted), it is possible for a jury to infer discrimination from indirect evidence that, e.g., an employer made a particular employment decision in contravention of established and consistently-applied procedures, that management personnel made comments reflecting a negative attitude toward older workers, that company documents indicate a preference for younger employees, or that relevant statistics demonstrate a pattern of adverse treatment of older workers. *See generally McDonnell Douglas*, 411 U.S. at 804-05. But Respondent produced no such evidence here. The complete absence of any evidence linking Harbison-Walker's decision to Respondent's age amply demonstrates that this purportedly "close case" (R. Br. 13; U.S. Br. 17 n.11), in fact, is not a case of discrimination at all.

III.

This is hardly an "unexceptional case" (U.S. Br. 7). The court below has sent what is, indeed, an exceptional signal to courts in the Third Circuit: that, even in a case where the plaintiff has mustered no direct or circumstantial evidence from which a reasonable jury could possibly conclude that he is the victim of unlawful discrimination, summary judgment is unavailable. Tolling the death knell for summary judgment in age discrimination cases, as the decision below does, plainly thwarts the important policies underlying summary judgment procedure. It disregards "the rights of persons opposing [a plaintiff's] claims . . . to demonstrate in the manner provided by [Rule 56], prior to trial, that the claims . . . have no

factual basis" and permits those claims to "go[] to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp. v. Catrett*, 477 U.S. at 327. That more employment-related civil rights cases go to trial than any other category of federal question and diversity cases only underscores that, absent a different signal from this Court, this unwarranted decision will produce a more significant drain on those resources. *See Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts* (1986), Table C-4 (at 206).

The important issue that this allegedly "unexceptional" case presents, moreover, has sparked substantial interest. The amici briefs filed by groups representing both the plaintiffs' bar and the employers' bar make amply clear that, after the decision below, they are uncertain as to the role of summary judgment in employment discrimination litigation. This confusion is not surprising. The decision below stands in stark contrast to the decisions of other courts that have upheld summary judgment against a plaintiff who merely "casts doubt" on the employer's articulated reason for a challenged decision but demonstrates no nexus between that decision and age discrimination. *See, e.g., Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987). Only this Court can resolve this "recurring area of confusion," *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 730 (1988), and send a clear signal to the lower federal courts: that where, as here, no reasonable jury could conclude that the plaintiff is the victim of age discrimination, summary judgment must be granted.

CONCLUSION

For the foregoing reasons, and for the reasons advanced in Petitioner's opening brief, the decision below should be reversed.

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